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ALEXANDER L. STEVAS,
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No. 81-1581

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Antone Olim, Edith M. Wilhelm, John Smythe, Winton Leong, and Edwin Shimoda,

Petitioners,

versus

Delbert Kaahanui Wakinekona,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

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I

THE PETITION SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT COURT OF APPEALS' DECISION IS SUPPORTED BY THE MAJORITY OF THE JUDGES OF THAT COURT AND IS NOT IN CONFLICT WITH PRIOR HOLDINGS OF THAT COURT; IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS; IS NOT IN CONFLICT WITH APPLICABLE STATE LAW; AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Petition for Writ of Ceritorari should be denied because the decision of the Ninth Circuit Court of Appeals is supported by a majority of its judges and is not in conflict with prior rulings of that court, and is not in conflict with decisions of other circuit courts of appeals, of the Hawaii state courts, or this court, because the decision is unique to its set of facts and within the power of the federal judiciary to rule on federal questions.

A. THE DECISION BELOW IS SUPPORTED BY THE MAJORITY OF THE NINTH CIRCUIT COURT OF APPEALS' JUDGES AND IS NOT IN CONFLICT WITH ITS PRIOR HOLDING.

The majority of the panel voted to deny petitioners' petition for a rehearing, and their suggestion for rehearing en banc failed to receive the affirmative vote of a majority of the active judges. The decision is clearly supported by the majority of the Ninth Circuit Court of Appeals' judges. Petition Appendix B-1.

Petitioner, citing Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980) suggest this decision is in conflict with prior holdings. The specific question in Jacobson was the extent to which the Nevada Gaming Control Act gave the plaintiff an expectation of a right to a license to create a property interest protected by due process. In Jacobson the Ninth Circuit pointed out that the language of the Nevada statute omitted language that would create such an expectation and that a fundamental right was not at issue. The language of Hawaii prison transfer regulations includes language that created such an expectation and affected a fundamental right. The decision below is not in conflict with the Ninth Circuit's prior holdings. Indeed it is consistent with its prior holdings. See Petition Appendix A-6.

B. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS' DECISIONS.

The petitioners suggest that the decision below is in conflict with other courts of appeals' decisions. They cite Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977); Cofone v. Manson, 594 F.2d 934, 938 (2nd Cir. 1979); and Bills v. Henderson, 631 F.2d 1287, 1298-1299 (6th Cir. 1980); that rejected claims that some state procedures required by specific transfer regulations create a liberty interest protected by the due process clause. Petition 6-9. The Ninth Circuit considered the cases petitioner suggests are inharmonious with the decision below and found them distinguishable. Petition Appendix A-7.

In distinguishing these cases from this action the court stated that while these cases may be interpreted as "holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, we must disagree. The real issue is whether the transfer regulations create an entitlement to procedural protections." Petition Appendix A-7.

The Hawaii prison regulations clearly provide for specific procedures before any transfer involving a grievous loss and they define an interstate transfer as a grievous loss. Because the Hawaii regulation requires that a transfer will not be consumated absent an impartial hearing there is a justifiable expectation that a prisoner will not be transferred absent the specified procedures. Thus a constitutionally protected liberty interest arises. Petition Appendix A-8.

Additionally, the instant case is unique. The holding by the court below that respondent Wakinekona has stated a claim based on specific Hawaii prison statutes is a limited holding. The prison transfer statutes of Massachusetts and New York do not require the same elaborate procedures as Hawaii does. Petition Appendix A-6 and B-4. Therefore, the decision below is not in conflict with other circuits.

C. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE STATE LAW.

Petitioners maintain that the Ninth Circuit decision conflicts with a decision of the Hawaii Supreme Court. In Lono v. Ariyoshi, 63 Haw. __, 621 P.2d 976 (1981), the Hawaii Supreme Court decided a case involving the same transfer regulations at issue here. While the Hawaii Supreme Court held that no Fourteenth Amendment liberty interest was created by the regulations "it is a Federal question whether the interest created by the state statute or regulation is to be accorded protection under the Fourteenth Amendment." (Emphasis added.) Petition Appendix B-3. See Memphis t. Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978). The decision below is not in conflict with applicable state law.

D. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioners urge that the Ninth Circuit has decided the case in conflict with applicable decisions of this court. This Court, in Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haynes, 427 U.S. 236 (1976) held that prison transfers do not automatically trigger the protections of the due process clause of the fourteenth amendment. The Hawaii prison transfer regulations differ substantially from those at issue before this court in Fano and Haynes. Thus those cases are not controlling here. The decision of the court below is not in conflict with Fano and Haynes.

II

THE DECISION DOES NOT INVOLVE IMPORTANT QUESTIONS REGARDING THE NATURE OF DUE PROCESS RIGHTS WHICH HAVE NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT.

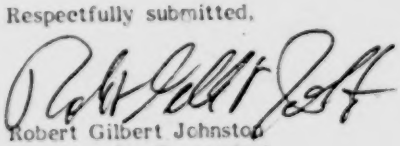
This case involves a civil rights action by a prisoner who was transferred from Hawaii to California without a due process hearing. The Ninth Circuit fully considered and discussed the substantial relevant precedent and applied it to the

unique facts of this case. The Hawaii prison transfer regulations, then in effect, specifically provided for a hearing before an impartial committee in order to protect against "arbitrary or uninformed action by the prison administration." Petition Appendix A-9. The principles of due process applied in this case are well-settled by prior decisions of this court and correctly applied by the court below.

CONCLUSION

For the aforementioned reasons the Petition for Writ of Ceritorari should be denied.

Respectfully submitted,



Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

CERTIFICATE OF FILING AND SERVICE

Robert Gilbert Johnston, an attorney, states that a copy of the above document was filed with the Clerk of the United States Supreme Court and served on:

Michael A. Lilly, Esq.
First Deputy Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

by mail on May 4, 1982.

Robert Gilbert Johnston

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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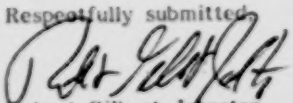
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes Delbert Kaahanui Wakinekona, Respondent, by Robert Gilbert Johnston, his lawyer, and in accordance with United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis, and in support states that he has been incarcerated in prison for over ten years and is without funds, as more fully stated in the affidavit of Robert Gilbert Johnston attached hereto, so that he is unable to pay for the costs of this proceeding, including the printing of the brief in opposition to the petition for a writ of certiorari which this court requested Wakinekona file.

Respectfully submitted,



Robert Gilbert Johnston
Attorney for Respondent

315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

AFFIDAVIT OF ROBERT GILBERT JOHNSTON

Robert Gilbert Johnston, being first duly sworn, states:

1. The affiant is admitted to practice before this Court, is admitted to practice before Illinois and Hawaii courts, and is now a professor of law at The John Marshall Law School, Chicago, Illinois.

2. The affiant first represented Delbert Kaahanui Wakinekona in about 1972 at the request of Antone Olim, then warden of the Hawaii State Prison in Honolulu, where Wakinekona was incarcerated, in seeking to commute Wakinekona's sentence from life without the possibility of parole to life.

3. The affiant is familiar with Wakinekona's records in Hawaii and from the time he first undertook to represent Wakinekona until Wakinekona was transferred to California spoke to Wakinekona at regular intervals either in person or by telephone.

4. The affiant is familiar with some of Wakinekona's records in California which have been provided to him by California officials and has spoken to Wakinekona about once a month by telephone since Wakinekona was transferred to California.

5. The affiant or Clayton C. Ikei, who is licensed to practice before the California and Hawaii courts and is co-counsel in this case, are the only lawyers who have advised or represented Wakinekona since 1972 with the exception of one administrative hearing when Wakinekona was represented by the Hawaii Public Defender.

6. The affiant and Clayton C. Ikei have represented Wakinekona without charge on all occasions, except, two, when they were reimbursed by the State of Hawaii for their services, since Wakinekona is incarcerated and without funds to pay for legal services.

7. The affiant knows Wakinekona's parents and siblings who also are unable to assist Wakinekona financially for legal services.

8. The affiant spoke to Wakinekona about the necessity of filing a reply to the Petition for a Writ of Certiorari in this cause and was advised that Wakinekona is still without funds.

9. Wakinekona has not sought to proceed in forma pauperis before in this action.

Robert Gilbert Johnston

Subscribed and sworn to before me
this 4th day of May, 1982.

Notary Public

My commission expires on
October 31, 1984.

CERTIFICATE OF FILING AND SERVICE

Robert Gilbert Johnston, an attorney, states that a copy of the above document was filed with the Clerk of the United States Supreme Court and served on:

Michael A. Lilly, Esq.
First Deputy Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

by mail on May 4, 1982.

Robert Gilbert Johnston